United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

w/affidavit

74-1214

To be argued by
GERALD A. ROSENBERG

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1214

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ANCORP NATIONAL SERVICES, INC.,
Defendant-Appellant.

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLEE'S BRIEF

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for Plaintiff-Appellee.

GERALD A. ROSENBERG,
NAOMI REICE BUCHWALD,
Assistant United States Attorneys, of Counsel.

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Preliminary Statement

This is an appeal by defendant Ancorp National Services, Inc. ("Ancorp") from a final judgment entered in the United States District Court for the Southern District of New York on December 18, 1973, awarding the plaintiff, United States of America ("Government"), civil penalties in the amount of $204,200.00 and costs of $1,430.66, and permanently enjoining Ancorp from further violations of a cease and desist order of the Federal Trade Commission ("FTC") (1058a).* The judgment was entered in accordance with the Opinion of the Hon. Dudley Bonsal, dated November 30, 1973, holding that Ancorp had committed 122 violations of the FTC Order, which essentially

* Page references to the Appendixes will be indicated by a number followed by the letter "a", both within parentheses. The appellant and appellee have filed separate appendixes, which have been numbered consecutively to avoid confusion.

barred Ancorp from inducing its suppliers to enter into discriminatory promotion and display service contracts (1048a). Judge Bonsal's Opinion is reported at 367 F. Supp. 1221 (S.D.N.Y. 1973).

The action was commenced on December 31, 1970 by the filing of a complaint in which the Government sought $585,000.00 in civil penalties, pursuant to 15 U.S.C. § 45(1), as well as equitable relief, pursuant to 15 U.S.C. § 49. The complaint alleged that between 1965 and 1969 Ancorp entered into a score of transactions with the publishers of the three major daily newspapers in New York City, New York, the New York Times, the New York Post and the Daily News, each of which violated the terms of the cease and desist order issued by the FTC, modified and affirmed by the Court of Appeals for the Second Circuit, and made final by operation of law on May 13, 1974 (5a). Issue was joined on February 25, 1971 (15a).

On July 30, 1971, Ancorp moved before United States District Judge Harold R. Tyler, Jr., to whom the case was initially assigned, for an order dismissing the complaint or, alternatively, staying the action pending an administrative hearing before the Federal Trade Commission. Ancorp contended that the action was prematurely brought because the acts involved related to newspapers, which were not, the defendant alleged, the subject of the original FTC proceeding. Ancorp also maintained that before a civil penalty action could be commenced hearings must be held before the Federal Trade Commission with respect to the scope of the order and the defendant's alleged non-compliance therewith. Ancorp's motion was squarely premised on the first two affirmative defenses in its amended answer. Following oral argument, Judge Tyler dictated a memorandum decision denying both branches of relief sought by the defendant (72a).

After a period of extensive discovery by both sides,* the parties entered into a Pre-Trial Order on February 28, 1973, stipulating to a few facts about the corporate characteristics of the defendant and three of the newspaper publishers, and outlining the balance of their factual and legal contentions (95a).

Shortly thereafter, on March 20, 1973, Ancorp filed a Chapter XI petition in bankruptcy; on the same day, Referee Edward Ryan signed a Restraining Order barring all further litigation against Ancorp in any jurisdiction. Upon the motion of the United States, a creditor in the bankruptcy proceeding, and with Ancorp's consent, Judge Ryan entered an Order on May 7, 1973, specifically permitting the instant action to proceed in District Court (143a).

Neither side having requested a jury, the case was tried to Judge Bonsal over the course of four days in July of 1973. The Government called witnesses from the Times, the News, the Post, the Wall Street Journal and the late New York Herald Tribune. Ancorp called two of its corporate employees and the president of a rival multi-newsstand company. The District Court's Opinion, containing the requisite findings of fact and conclusions of law under F. R. Civ. P. 52(a), held Ancorp liable for penalties in an amount less than half of that prayed for by the Government. This appeal followed. Ancorp has neither paid

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* Interrogatories and requests for documents were served and answered by both sides. The Government took the deposition of the following five witnesses: Henry Garfinkle, on August 5, 1971; William McCollough, on August 17, 1971; Morris Strassman, on June 23, 1972; Herbert Frilen, on September 12, 1972; Vincent Mineo, on November 6, 1972; and (after the entry of the Pre-Trial Order) Roy I. Newborn on June 7, 1973; Ancorp deposed five witnesses: Joseph Gercke, on October 21, 1971; William Welkowitz on November 18, 1971; Louis Loeb, on December 22, 1971; Ivan Veit, on January 26, 1972; and Nathan Goldstein, on February 23, 1972.

the judgment nor posted security.* Following the confirmation of its arrangement with its creditors, the Government will press for satisfaction of judgment.

Statement of Facts

A. History of the Federal Trade Commission Proceedings

The original proceeding in this matter was instituted by the Federal Trade Commission's issuance of a complaint on February 5, 1959, charging respondents American News Company and Union News Company ** with having violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by inducing and coercing various suppliers, including publishers of magazines, pocket books, comic books and cigars, to make payments or to grant allowances in connection with the display and sale of such products on respondents' newsstands, when respondents knew, or should have known, that such payments were not being offered or made available on proportionally equal terms to all customers of such suppliers who were in competition with respondents (P.T.O., 98a).***

At the conclusion of the hearing, an initial decision and order was issued on May 26, 1960, by the Hearing Examiner, who found that the respondents violated 15 U.S.C. § 45 by "knowingly attempting to induce, or inducing discriminatory payments," and by "receiving" such

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* The Government has not sought to collect the judgment thus far because of the representation of trial counsel to the District Court, during discussions of the penalty question, that the Government would follow a policy of forbearance during the Chapter XI proceedings (1072a).

** The American News Company changed its name in 1969 to Ancorp National Services, Inc.; the Union News Company, now a division of Ancorp, was in 1959 a wholly-owned subsidiary of the American News Company.

*** Pre-Trial Order, Part III, containing the stipulations of the parties.

payments in connection with their purchases of products for resale on newsstands, "including magazines, pocket books, paperback and comic books, newspapers, cigars, candy, toys and sundry items . . ."; 58 FTC 10, 20 and 21 (1961) (41a).

In issuing its order to cease and desist on January 10, 1961, the Commission modified the Hearing Examiner's initial decision by reversing the findings dealing with the "Attempted Coercion of Cigar Manufacturers" for failure of proof, but it expanded the product coverage provisions of the Order in the belief "that the public interest will be adequately served by an order prohibiting respondents from actually receiving discriminatory allowances from suppliers, including cigar manufacturers" (51a-52a).

On January 17, 1961, copies of the Commission's order were duly served on respondents by registered mail, and on March 14, 1961, respondents filed a petition for review of the Commission's order in the Court of Appeals for the Second Circuit.

The respondents raised five broad issues on appeal: first, whether transactions with their suppliers were in commerce; second, whether violations of § 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d), constitute violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; third, whether the payments denominated "promotional allowances" were—as respondents urged—disguised price allowances and thus outside the scope of § 2(d) of the Robinson-Patman Act; fourth, whether respondents knew they were inducing discriminatory agreements from their suppliers; and fifth, whether an alleged price-fixing scheme engaged in by their suppliers was a defense to their own unfair competitive practices. The Court of Appeals separately considered and rejected each of respondents' arguments. *American News Company* v. *F.T.C.*, 300 F.2d 104, 108-110 (2d Cir. 1962).

The Court of Appeals entered its decision modifying and affirming the FTC order on February 7, 1962, and its

"Final Decree Modifying and, As Modified, Affirming and Enforcing Order To Cease and Desist" on April 27, 1962, 300 F.2d 104 (2d Cir. 1962). The FTC Order was modified so that it barred only the "actual inducement and receipt of display and promotional allowances", 300 F.2d at 111, in conformity with the reach of § 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d).

A petition for a writ of certiorari for Supreme Court review of the decision of the Court of Appeals for the Second Circuit was filed on July 19, 1962 by respondents. The Supreme Court denied the petition on October 8, 1962 (371 U.S. 824 (1962)).

An order to cease and desist in accord with the Court of Appeals' decree was rendered or issued by the Commission on April 13, 1964, and became final by operation of law on May 13, 1964. 15 U.S.C. § 45(i). Copies of the final order were served upon the respondents by registered mail on April 17, 1964. The final order to cease and desist has not at any time since May 13, 1964, been modified or set aside, and has at all times since such date been in full force and effect (P.T.O., 102a).

B. Nature of Defendant and its Operations

A majority of the shareholders agreed at the annual meeting of The American News Company on April 30, 1969, to change the name of their company as of May 1, 1969, to Ancorp National Services, Inc., the defendant in the present action. Ancorp is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located within the Southern District of New York (P.T.O., 96a-97a).

One of Ancorp's operating divisions is the Union News Division, which was formed after the merger with its

wholly-owned subsidiary, The Union News Company, in 1959. At all relevant times including the period 1964-1969, The Union News Division operated a large number of newsstands, which were located primarily at railroad, airport, bus and subway terminals, and in the lobbies of major hotels and office buildings. Most of these stands sold magazines, comic books, paperback books, candy, tobacco products and other items in addition to newspapers. A large number of these newsstands operated in New York City, but they were also located in other parts of New York State as well as in twenty-one other states and the District of Columbia (P.T.O., 97a).

The handling and sale of newspapers, magazines, and other merchandise and products for resale on Union News newsstands was generally arranged at or through the defendant's main office. The actual distribution of newspapers to Union News outlets is done by the newspaper companies directly and by wholesale distributors, such as Manhattan News, Kings County News Co., Weinberg News Co., and Bay City News Co. in the New York Metropolitan area. In other parts of the United States, the Union News newsstands receive their New York City newspapers primarily from the local wholesaler (P.T.O., 98a).

Locations for Union News newsstands are generally obtained by or under lease, and are frequently situated in high consumer traffic locations. A customary term of leases between Union News (as lessee) and the owners of railroad terminals, airports or other companies (as landlords) provides that the Union News company shall sell an enumerated list of products at its newsstands, usually including newspapers, magazines, paperback books, tobacco products and candies (P.T.O., 98a).

In attempting to differentiate Union News stands from those of its competitors, Ancorp has continually stressed the lease provisions governing the manner in which it shall

operate its newsstands (App. Br. at 6, 30). But these protestations notwithstanding, there was no proof in the record of any onerous lease conditions, nor of any different provisions in the leases of Ancorp's competitors, including Eastern News (Tr. 355, 497a).* In fact, the President of Ancorp testified at trial that it was the Union News Company, as tenant, and not the hotels, railroads and bus terminals, as landlords, that determined the hours during which the stands would remain open (Tr. 458, 601a). This same witness was unable to think of a single instance in which Union News had cancelled one of its allegedly burdensome leases (Tr. 406, 548a).

Many of the outlets of Union News, because of their size and location, have physical limitations in the number of products they can handle and in the amount of display or front counter space they have available. For this reason, both competitive and non-competitive suppliers vie for such display space on Union News newsstands to attract impulse buyers at such high traffic locations. Display space preference is usually given by the newsstand proprietor either at the direction of the defendant or by arrangement with the supplier, to high volume or high "turnover" items, such as newspapers, magazines, paperback books, candy and tobacco products (GX 12, 625a).** If such products are buried under the counter or hidden in the back of the newsstand, sales of such products by the newsstand diminish substantially (Tr. 26-27, 169a-170a).

In addition to attracting impulse buyers to Union News stands, the retail sales of newspapers played a not insignificant role in Ancorp's operations. Compare the net sales of newspapers as reflected in the table below with the net sales for all products and services set forth in Ancorp's Annual Reports (DX G) for the years 1966 through 1969:

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* References to the pages of the trial transcript will be indicated by a "Tr." followed by a number; the appendix page number will also be given.

** Government Exhibits at trial will be denominated "GX", Defendant's Exhibits "DX".

NEWSPAPER	PROFIT PER COPY SOLD	NUMBER OF COPIES SOLD	NET SALES
NEW YORK TIMES			
Daily Edition:			
1966	$.024	7,103,726	$ 170,489
1967	.024	8,790,312	210,967
1968	.024	9,239,275	221,742
1969	.024	6,029,390	144,705
TOTAL	—	31,162,703	747,903
Sunday Edition:			
1966	.085	281,874	23,959
1967	.085	338,752	28,793
1968	.13	377,446	49,067
1969	.13	330,767	42,999
TOTAL	—	1,328,839	144,818
NEW YORK DAILY NEWS			
Daily Edition:			
1966	.0168	15,015,906	252,267
1967	.0192	15,282,825	293,430
1968	.0192	16,032,679	307,827
1969	.0192	17,336,257	332,856
TOTAL	—	63,667,667	1,186,380
Sunday Edition:			
1966	.0475	661,398	31,418
1967	.0475	689,702	32,760
1968	.0475	816,261	38,772
1969	.0475	962,479	45,719
TOTAL	—	3,129,840	148,669
NEW YORK POST			
Daily Edition			
1966	$.024	7,553,463	$ 181,288
1967	.024	10,327,474	247,859
1968	.024	14,215,253	341,166
1969	.024	13,928,862	334,292
TOTAL	—	46,025,052	1,104,605

Sunday Edition:			
1966	.0325	410,232	13,332
1967	.0325	530,799	17,250
1968	.0325	649,446	21,108
1969	.0325	725,966	23,593
TOTAL		2,316,443	75,283
TOTAL FOR ALL NEWSPAPERS	—	—	$3,407,658*

C. The Newspapers

(i) New York Times

The New York Times Company publishes, prints, distributes and sells the New York Times (hereafter "the Times"). The New York Times Co. is a corporation organized and existing under the laws of the State of New York, and has its office and principal place of business at 229 West 43rd Street, New York, New York (P.T.O., 102a-103a).

Distribution of the newspaper is done directly by company trucks to retail newsstand dealers and operators in a limited area on the westside of New York City, namely, an area West of Fifth Avenue from about 23rd Street to the southern tip of Manhattan Island. The mailing to mail subscribers and to some distant national and foreign accounts is also directly handled by the company. The remainder and major part of the New York Times circulation is done by wholesaler distributors, which obtain their papers directly from the plant at 229 West 43rd Street, from deliveries by N.Y. Times trucks to the plants of suburban wholesalers (within a fifty-mile radius of Columbus Circle at 59th Street and 8th Avenue in New York City), or from deliveries made by common carriers (train, bus, air) to transportation terminals located beyond the

* The foregoing figures have been derived from the data furnished by defendant in Exhibits 4 and 4(a) attached to its amended answers to interrogatories (90a-91a). The term "net sales" refers to Ancorp's income from the sales of the respective newspapers, less the cost of the newspapers sold.

fifty-mile zone in other parts of the United States. The New York Times is distributed in virtually all major eastern and United States cities (P.T.O., 103a).

In 1969, the New York Times had a Sunday Edition circulation of over 1,400,000 copies, and a weekday circulation of over 1,060,000 copies—the latter more specifically distributed as follows:

New York City Proper	430,000-440,000
New York Suburban	350,000-375,000
Country and International	280,000-245,000

(P.T.O., 103a).

Throughout the period 1964-1969, the Times was sold from hundreds of Union News stands, mostly but not entirely in the metropolitan New York City area, and from thousands of other stands belonging to independent and other multi-outlet stands, many of which were proximate to Union News stands (Tr. 87a, 229a). The copies of the Times sold from Union News stands in no way differed from the copies sold at rival stands (Tr. 11, 154a).

On January 15, 1960, the Union News Company entered into a new collective bargaining agreement with a local union representing sales personnel at its stands. Shortly thereafter, the defendant sent letters on Union News Company letterheads, dated January 19, 1960 to each of the nine daily newspapers then published in New York City, including the Times, advising them of Union News' increased labor costs and of Union News' intention to raise the cover price of the daily newspapers by one cent per copy and of the Sunday newspapers by two cents per copy (GX 60a, 813a; Tr. 104-105, 246a-247a).

After a period of negotiation between representatives of the New York Times and of Union News relating to the price Union News would charge the public for copies of the New York Times, operators of Union News stands

ceased displaying or, in some cases, selling the New York Times. Union News refused to display copies of the Times from approximately May 3 to May 18, 1960 (Tr. 27ff, 169a; Tr. 60ff, 202a). Circulation of the Times dropped approximately 2,000 copies per day as a result of this bargaining tactic by Union News.

Shortly after the New York Times was restored to Union News stands, a meeting was called by Henry Garfinkle, then president of American News, to discuss pricing and other matters of mutual interest to the Times and Union News (Tr. 107, 249a). A luncheon meeting at the executive cafeteria of the New York Times on West 43rd Street took place on July 8, 1960, attended by Ivan Veit, Times Business Manager in charge of circulation; Nathan W. Goldstein, Times Circulation Director: William Welkowitz, Daily News Circulation Director; Henry Garfinkle; and Morris Strassman, Vice President of Union News (Tr. 29-30, 171a-172a).

The Newspaper company representatives were told that because of the recent signing of a new union contract, Union News had determined that revenues or rebates it received from the handling and sale of newspapers were insufficient. Garfinkle also indicated that somewhere in the neighborhod of $25,000 in additional revenue per annum was needed from the Times. Veit answered that the Times, without even considering further increases, was already troubled by the present rebate schedule with Union News, and inquired whether there was another solution to the problem. Garfinkle answered that he did have another suggestion, namely, that the Times buy display sign space that would be made available on Union News newsstands for promoting the New York Times (GX 12, 625a; Tr. 35-37, 177a-179a).

At no time during this meeting did Garfinkle or Strassman inquire whether the Times had proportionally equal promotion and display agreements with any of its other customers, or indeed whether the Times had any other promotion contracts at all (Tr. 38, 180; Tr. 113, 255a).

The Times saw in Garfinkle's proposal an opportunity to rid itself of the unsatisfactory "special price concessions" or discounts and rebates of $0.25 per hundred copies that Union News had been receiving since 1959 (Tr. 98-99, 240a-241a; DX A, 628a), and from the coercive tactics Union News used in the past to induce such price concessions by taking the New York Times off the display area or keeping the newspaper under Union News' counters. The price concessions to Union News cost the Times about $22,000 per year in 1960 (Tr. 25, 168a).

By letter dated April 20, 1961 (DX A, 628a), the Times accepted Garfinkle's offer of a promotion campaign at Union News stands. Retroactive to January of 1961, the Times agreed to pay Union News $4.00 per month for each of 500 locations at which the Times had a right to post placards promoting the newspaper. The Times was actually displayed and sold at somewhat less than five hundred Union News stands in the years that followed (Tr. 46, 188a). In 1961 when the Times entered into the promotion and display agreement with Union News, it was its custom to distribute advertising placards to other stands, which displayed them without charge to the Times (Tr. 104, 246a). At a few large stands, all outside the metropolitan New York area, the Times was charged and did pay fees of varying amounts for promotional rights (Tr. 43a, 185a).

The Times was billed and began paying the promotion allowance of $2,000 per month in January, 1961 (GX 14, 627a), and continued such monthly payments until August 1963, when the original agreement was amended to increase the monthly allowance to $4.90 per stand for 528 newsstand locations in New York and in other parts of the country, amounting to a total payment of $2,587.20 per month (Tr. 50, 193a; Tr. 127, 269a).

This change in the promotional service agreement occurred at about the same time that the cover price of the Times was increased by five cents, following a 114-day strike at the Times (Tr. 43, 192a), and *after* the Supreme

Court denied American News' petition for certiorari (October 8, 1962), thereby leaving stand the Court of Appeals' final decree affirming and enforcing the FTC's order. It also followed closely on the heels of a directive from president Garfinkle to "all officers and executives of the American News Company and the Union News Company" informing them of the existence of the FTC order and their duties thereunder (GX 61-3a, 88a).

Although the Times knew from field checks by its personnel that it was not receiving promotion and display services at each of the Union News newsstands where the New York Times was sold and for which it paid allowances, and notwithstanding the fact that American News attempted once again in December 1968 (GX 33, 685a; Tr. 131, 273a), to increase the monthly allowance payments, the Times continuously paid American News the monthly promotion and display allowance of $2,578.20 from August of 1963, until June of 1969.

It was not until after the article "Control of Newsstands Gives Henry Garfinkle Power Over Publishers" appeared in the *Wall Street Journal* on July 3, 1969, (GX 68 id; Tr. 440, 582a) that the Times wrote the Vice President of defendant Ancorp terminating the promotion agreement (Tr. 135, 277a).

Throughout the eight-year period in which Union News was paid the promotion allowances, the Times never offered, otherwise made available or paid to any but three other newsstand operators promotion or display allowances of the type or under the plan granted to Union News (Tr. 171-173, 313a-315a; GX 34, 35, 36). The three exceptions, out of several thousand competitors of Union News, were located in Boston, Washington, D.C., and Chicago; no proof was offered to show whether the Times' payments to them was proportionally equal to the payments made to Union News.

At no time between 1961 and 1969 did any officer or executive of Union News or its parent company ever in-

quire of the Times whether the Times had promotion or display agreements with any other newsstand operators (Tr. 126, 268a). Nor did the Times receive the letter dated October 24, 1962 from Herbert Frilen, Executive Vice President of the American News Company (GX 61-3, 87a) informing some of its suppliers of the terms of the FTC order (Tr. 51, 194a; Tr. 127, 269a). The failure of the Times to receive Frilen's letter is understandable in light of Mr. Frilen's testimony that the letter was sent only to *magazine* publishers (Frilen deposition Tr. 25-28, 1200a-1203a).

Nor was the Times notified at any time by American News or Union News that they could not accept such allowance payments unless they were equally or proportionally offered or given to newsstand dealers competing with Union News in the distribution and sale of the Times. Under the totality of the circumstances, Ancorp knew, or should have known, that the promotional allowances it received from the Times were not offered or otherwise made available to competitors of Union News.

(ii) New York Daily News

The New York Daily News is a newspaper published, distributed and sold by the News Syndicate Co., Inc., hereinafter referred to as The News, which has its office and principal place of business at 220 E. 42nd Street, New York, New York. The News is a corporation organized and existing under the laws of the State of New York. It is also a subsidiary of the Tribune Co., a corporation organized and existing under the laws of the State of Illinois (P.T.O., 104a).

The Daily News is distributed to local, suburban and country newsstand dealers and operators in much the same way as the New York Times. In 1969, over 2,100,000 copies of the Daily News were circulated daily and approximately 3,000,000 copies on Sunday. A more specific allocation of the weekday circulation was as follows:

New York City Proper	—	1,200,000
New York Suburban	—	600,000
Country and International	—	300,000

(P.T.O., 104a).

Weekday circulation for 1969 can also be broken down into 6,700 copies to mail subscribers; 200,000 copies to home delivery accounts (255,000 on Sunday), and the remainder to country and newsstand sales. The Daily News is distributed and sold in most of the major eastern cities, including Philadelphia, Boston, Washington, Pittsburgh, Miami Beach and Hartford, and several of these cities have Union News outlets handling this newspaper (P.T.O., 104a-105a).

In New York City, deliveries are made by The News trucks to each Union News newsstand on regular customer routes of the Daily News. On the route covering Grand Central Station, for example, the Daily News is delivered to each of the Union News and other newsstands and "hustler" operations in this area. There is a high degree of competition between Union News and other newsstands in the Grand Central Station area in the distribution and sale of the Daily News (Tr. 181, 323a). There is also substantial competition in the sale of this newspaper between Union News' outlets in suburban stations and independent newsstands including two multi-stand retail outlets located in proximity to such Union News outlets (Tr. 226, 368a). The copies of the News sold from Union News stands are physically indistinguishable from the copies sold at competing stands (Tr. 181, 323a).

At the meeting held in the executive dining room of the New York Times building at West 43rd Street in New York City in early July of 1960, attended by William Welkowitz, then Circulation Director of the New York Daily News, representatives of Union News first broached the subject of a placard display arrangement for the pro-

motion of newspapers, The News included (Tr. 30, 173a) (*supra,* 17-18).

There is no evidence to indicate that further overtures were made by Union News for the ensuing three years. However, on December 4, 1963, the Vice President of Union News wrote a letter to The News complaining about the wholesale cost of the News to Union News (GX 38, 799a).

Similar complaints by Union News continued during early 1964. Discussions between these two companies, initiated by W. A. McCollough on behalf of Union News, apparently shifted during mid-1964 from increasing commissions to a program for the payment of promotion and display allowances (Tr. 188, 330a). On or about September 22, 1964, The News entered into an agreement for the payment of an allowance to Union News of $500 per week for promotion services (GX 44, 802a). The payments were to be made retroactive to June 1, 1964. The promotion services to be performed by Union News under the agreement were the installation and maintenance on or at its newsstands of approximately 1000 sign holders and promotional placards furnished by The News (Tr. 195, 337a; Tr. 227, 369a).

Sales representatives of The News checked Union News stands to insure that the Daily News posters were being displayed (Tr. 229, 371a). From time to time, it came to the attention of The News that some Union News newsstands were not displaying the placard holders and Daily News advertising materials (Tr. 234, 376a). Nevertheless, The News continuously paid Union News the $500 per week (or $2,000 per month) display allowance from June, 1964, until March, 1969 (GX 50, 806a) except for a three-week period from September 17 to October 10, 1965, when The News was shut down by a labor strike (Tr. 200, 342a).

In late 1968, The News refused to accede to a covert attempt by Union News to raise the allowance from $500

to $600 per week in late 1968 and early 1969 (Tr. 199, 341a). On August 4, 1969 The News terminated the $500 allowance program by writing Union News as follows:

> This is to confirm that The News, on advice of counsel, will not pay the weekly invoices submitted by you for advertising services dated March 3, 1969 and each week thereafter (GX 52, 803a).

The News did not at any time during the effective period of its agreement with Union News for the payment of a $500 per week allowance for promotion and display services offer or make available an equivalent or proportional display allowance program to any other Daily News customer (Tr. 201, 343a). Instead, it distributed Daily News placards for display at independent stands at no cost to the News company (Tr. 229, 371a). Union News knew, or should have known, that the allowance program it worked out with The News in 1964, as an alternative to The News' payment of higher commissions, was not offered or made available to newsstand dealers competing with Union News newsstands in the distribution and sale of the Daily News. No officer or executive of Union News, or of its parent company, American News, ever notified the News orally or in writing that Union News and American News were subject to an FTC Order barring promotional or display agreements with their suppliers, except where the proportionality requirement was satisfied. The one form of notification cited by Ancorp on appeal, Herbert Frilen's letter of October 24, 1962 (GX 61-3(a), 87a), was never received by the News (Tr. 202, 344a).

(iii) New York Post

1. The third and smallest of New York City's three major daily newspapers is the New York Post, which is published, distributed and sold by The New York Post Co., Inc., hereinafter referred to as the Post. This corporation is organized and existing under the laws of the State of New York and maintains its main office and principal

place of business at 75 West Street, New York, New York (P.T.O., 105a).

Circulation and distribution of the Post is similar to that previously discussed for the New York Times and The News. Deliveries are made directly by the Post trucks to independent and Union News newsstands in Manhattan and the Bronx, in certain areas of Queens and Brooklyn, and to downtown Newark, New Jersey. In almost all other areas, suburban and country, the circulation or delivery of the Post is done by wholesalers (Tr. 248-249, 390a-391a).

The Post in 1968 had a weekday circulation of about 650,000 copies daily, and a Saturday circulation of over 350,000 copies. Of this total circulation, Union News newsstands took about 70,000 copies daily on weekdays and about 18,000 copies on Saturday (P.T.O., 105a). In the metropolitan New York area, during 1963-1964, the Post was sold at about 180 Union News stands and at about 4,000-5,000 other newsstands (Tr. 250, 392a).

In connection with the circulation of the Post to Union News newsstands located in the suburban and country areas, the Post from 1943 to July, 1969, paid Union News rebates which from 1964 to 1969 amounted to twenty-five cents ($.25) per one hundred copies sold in the suburban area, and one dollar ($1.00) per one hundred copies sold in the country area (Tr. 256, 398a). These rebates averaged around $40.00 per week and were little more than price concessions granted to Union News (Tr. 257, 399a). The Post had no rebate or price allowance agreement during these years with any other retail outlets, multi-stand or independent (Tr. 255, 397a).

In April of 1964, at about the time of an increase in the cover price of the Saturday edition of the Post from ten to fifteen cents, Union News representatives began to press the Post for increased revenues or commissions for handling the Post on Union News newsstands (Tr. 260, 402a).

Both Henry Garfinkle and William McCollough told representatives of the Post that Union News wanted a larger proportion of the five cent rise in cover price than the Post had offered (Tr. 265, 407a).

Further pressure for an upward adjustment in commissions was applied by Union News in withholding the sum of around $44,000 owing to the N.Y. Post (Tr. 266, 408a; Tr. 297, 439a). In the course of a phone conversation on or about June 1, 1964, Byron Greenberg, Business Manager of the Post, told William McCollough that the Post was unable to give Union News additional commissions without doing the same for other news dealers because of the illegality of such an arrangement (GX 7, 619a).

It was in this same conversation that the discussion turned to a promotional allowance program, instead of a higher commission (Tr. 272, 414a). On July 1, 1964, the Post agreed to pay Union News an allowance of about $50 per month for the display of advertising placards (Tr. 275, 417a). At the time this agreement was reached, the Post was distributing advertising material to other newsstands; these stands used the posters without charge to the Post (Tr. 304, 446a).

From the inception of this promotional plan on July 1, 1964, until its termination in June, 1969, the Post continuously made monthly payments of $50.00 to Union News. Union News attempted in late 1968 and early 1969 arbitrarily to increase the $50 allowance to $75, but the Post refused to adopt the increase in payments (Tr. 286, 428a).

In terminating its allowance agreement on July 22, 1969, the Post wrote defendant Ancorp:

> "We have been informed by counsel for the Federal Trade Commission that the promotional allowances and rebates which have been paid to the Union News Company may be in violation of the Robinson-Patman Act.

Accordingly, such payments will terminate herewith" (GX 2, 618a; Tr. 287, 429a).

The only service Union News performed for its $50 per month allowance for five years was putting up the Post's 13 posters or display cards (Tr. 282, 424a; GX 9, 623a). During the five years that the $50 per month allowance agreement was in effect, the Post never once offered or made such allowances available to any other dealer. No representative of Union News at any time indicated to the Post that the allowance payments should be made available to other dealers distributing and selling the Post or asked whether they were made available (Tr. 282, 424a).

(iv) Other Newspapers Still Extant

Between the years 1964 (when the F.T.C. order became final) and 1969, the Union News entered into agreements or failed to abrogate existing agreements with certain newspapers, in addition to those named in the complaint, under the terms of which the publishers of said newspapers agreed to pay Union News a rebate, price allowance or other compensation in connection with Union News promotion or sale of said newspapers on its stands.

Illustrative of the practices of the Union News Company with newspapers other than the Times, the News and the Post is the case of the Wall Street Journal ("Journal"). Published in four editions by the Dow Jones Company, the Journal has been sold from thousands of newsstands, including but not limited to Union News stands, for many years including those following the entry of the Federal Trade Commission Order (Tr. 309, 451a). As in the case of the other major daily newspapers, the Journal that is sold from Union News stands is physically indistinguishable from the Journal sold from other stands, many of which are located in the vicinity of Union News' outlets (Tr. 312, 454a).

In the fall of 1965, William McCollough had discussions with several Dow Jones circulation executives to ex-

plore the possibility of increasing Union News's profit margin in the retail sales of the Journal (Tr. 320, 462a). After the straight price allowance proposal was rejected, McCollough proposed that the Journal pay $500.00 per month to Union News for the right to display promotional material at Union News stands. This offer, which would cost the Journal about one-sixth as much as McCollough's first proposal, was accepted by the Journal (Tr. 321-323, 463a-465a). The agreement remained in effect from the fall of 1965 until January of 1968,* when the Journal changed its cover price from ten to fifteen cents and renegotiated the cost per copy to all wholesalers, including Union News (Tr. 324, 467a).

From mid-1965 through the end of 1967, the Journal distributed an average of five thousand copies of each promotional poster, of which 350 to 400 were sent to Union News stands; the independent stands displayed the advertising material without charge to the Journal. Union News never inquired of the Journal as to its contracts, if any, for promotional display with other newsstand dealers (Tr. 326, 468a). Allowances other than for promotional display material were made with a few other vendors of newspapers, but these were not proportionally equal or comparable to the payments made to Union News (Tr. 335-337, 477a-479a).

Although the agreement was terminated effective January of 1968, "[t]his did not deter or stop Union News from continuing to bill us up through the summer and into the fall of 1968", according to John Potulny, who was then national manager of the Journal's news dealer sales division (Tr. 328, 470a; GX 65, omitted from Appendix).

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* In a letter to the Court, dated July 17, 1973, signed by Robert S. Potter, Esq., of Patterson, Belknap & Webb, Esqs., counsel for the Journal stated that the payments of $500.00 per month to Union News began in July, 1965 and ended in December, 1967. The letter, which was submitted in response to a request from Judge Bonsal (Tr. 334, 476a), was never marked a Court exhibit and is not part of the record on appeal. Trial counsel were sent copies and the original remains in Judge Bonsal's chambers.

As the invoices sent from Union News to the Journal made clear, the services for which Union News received $500 per month were purely promotional.

(v) Defunct New York City Newspapers

Several daily New York City newspapers—the Herald-Tribune, the Journal-American, the World-Telegram & Sun, and the Daily Mirror—which ceased publication, respectively, on April 24, 1966, April 24, 1966, April 23, 1966 and October 30, 1963, were repeatedly pressed by representatives of American News to enter into price allowance agreements. *See,* form letter, dated January 19, 1960, signed by Morris Strassman, Vice President of Union News to, e.g., Daily News (DX E, 830a).

In the case of the Herald Tribune, the Government established that Union News, acting through Henry Garfinkle, was able to extract a $12,000 or $15,000 per year placard contract from the Tribune's circulation director, Roy I. Newborn, at a meeting on May 23, 1963 (Newborn deposition, Tr. 41-42, 1128a-1129a). From mid-1963 until the demise of the Herald Tribune in 1966, Union News billed and the Herald Tribune paid the stated amount for promotional and display services at Union News' stands. The Herald Tribune had no comparable agreements with any of its other customers; nor, as usual, did American News or Union News inquire about the existence of such agreements or inform Newborn of the FTC Order (Newborn deposition Tr. 49, 1136a).

After reviewing the record with care, the District Court summarized its findings in these terms (1055a-1056a):

> "With respect to the total payments received, the evidence shows that during the period from January 1, 1966 to the termination of the arrangements with the three newspapers in 1969, Union News received payments in violation of the FTC Order totalling $108,662.40 from the Times, $82,000.00 from the Daily News, and $2,100.00 from the Post; combined, these payments total $192,762.40. [Footnote omitted]" 367 F. Supp. at 1225.

The record is replete with examples of Union News' cavalier disregard for the FTC Order, its high-handed treatment of newspapers, and its indifference to the inequality of treatment accorded its newsstand competitors. Although the defendant offers deceptively complex excuses for its conduct, the purpose of its activity was simply and aptly characterized by Judge Bonsal at the close of trial in this fashion: "I heard Mr. McCollough's testimony and I think he was quite candid when he said that he was looking for more profit" (Tr. 475, 1068a).

The Government submits that the District Court's findings of fact (1051a-1054a) highlight the operative transactions and occurrences in this case; they are clearly correct.

Counter-Statement of the Issues

1. Whether the District Court was correct in finding that Ancorp had committed 122 violations of the FTC Order.

2. Whether all of the following affirmative defenses are without merit:

(a) the allegation that the Federal Trade Commission did not certify the violations to the Attorney General prior to suit;

(b) the argument that the FTC Order does not apply to newspaper suppliers of Ancorp;

(c) the argument that the payments by the newspapers to Ancorp were price allowances rather than consideration for promotional and display services; and

(d) the allegation that Ancorp satisfied the notification and inquiry requirements of the FTC Order with respect to its newspaper suppliers.

3. Whether the District Court acted within its discretion in imposing penalties of $204,200.

4. Whether the District Court was justified in permanently enjoining Ancorp from further violations of the FTC Order.

Relevant Statute

Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1) (1970),* provided as follows:

> "Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of a continuance of such failure or neglect shall be deemed a separate offense."

The Federal Trade Commission Order

The cease-and-desist Order of the Federal Trade Commission, as modified and affirmed by the Second Circuit Court of Appeals, provided in relevant part as follows:

> "IT IS ORDERED that the respondents, The American News Company and The Union News Company,

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* Section 5(1) was amended on November 16, 1973; "the amendment extended the penalty clause to all Commission orders rather than merely cease and desist orders, increased the maximum penalty per violation to $10,000, and empowered the district courts to grant injunctive relief in the enforcement of Commission orders." *United States* v. *J. B. Williams Company, Inc.*, 498 F.2d 414, 418 n. 2 (2d Cir. 1974). With the exception of the provision relating to the equitable power of the District Court, the Government does not contend that the amendment has any bearing upon the resolution of the issues on appeal.

corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:

Receiving, or inducing and receiving, or contracting for the receipt of, anything of value from any of their suppliers as compensation or in consideration for display or promotional services or facilities furnished by or through respondents in connection with the processing, handling, sale, or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondents in the sale and distribution of such suppliers' products."

ARGUMENT

POINT I

The proof at trial establishing Ancorp's multiple violations of the FTC order was not rebutted by any factual or legal defense.

In its first four points on appeal, Ancorp contends that the District Court erred in finding that it had committed multiple violations of the Federal Trade Commission cease and desist order. Without challenging any particular finding of fact as "clearly erroneous", Fed. R. Civ. P. 52(a), Ancorp nonetheless maintains that Judge Bonsal erred, both as a matter of fact and of law, in finding any

liability whatsoever. After a brief review of the Government's theory of the case, it will be shown below that each of these arguments is without substance.

The complaint having been filed on December 31, 1970, violations of the FTC Order committed by defendant prior to December 31, 1965 are barred under the statute of limitations for a civil penalty action. 28 U.S.C. § 2462. The complaint alleged that defendant Ancorp, acting through its subsidiary (later its sub-division), the Union News Company, had violated the FTC Order on 117 occasions in its arrangements with the New York Times, the New York Daily News and the New York Post.

It is clear from a plain reading of the Order that each time that Union News "received" or "induced and received" or "contracted for the receipt of" any consideration from any of its suppliers—including, of course, the companies from which it purchased the Times, the News and the Post —without satisfying the proportionality requirement, a violation was committed. This interpretation of the Order is buttressed by the statute upon which the suit is founded, section 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1). This provision was enacted as part of the 1938 Wheeler-Lea Amendment to the Federal Trade Commission Act. § 3 of Act of March 21, 1938, c. 49, 52 Stat. 117. As the Court of Appeals for the Second Circuit noted in *United States* v. *St. Regis Paper Co.*, 355 F.2d 688, 692 (2d Cir. 1966), the legislative history surrounding the enactment of the FTC civil penalty section is sparse, but in 1959 some light was shed on Congress' intent when it added an identical penalty provision to the Clayton Act, which has since been codified at 15 U.S.C. § 21(1). In discussing the proposed amendment, Congressman Roosevelt reviewed the F.T.C.'s twenty years of experience with the civil penalty provision and urged the enactment of a comparable provision in the Clayton Act:

> "Also incorporated in this amendatory legislation are the penalty provisions of the Federal Trade Com-

> mission Act; that is, the imposition of a civil penalty of not more than $5,000 for each violation of an order. *Each separate violation of a given order would be considered as a separate offense,* ***." 86th Cong., 1st Sess. July 6, 1959; Vol. 105 part 10 Cong. Rec. 12732 (Emphasis supplied).

Congressman Roosevelt's description of the effect of the penalty provision in the context of the Clayton Act applies with equal force to cases where the Federal Trade Commission's Orders have been flouted. Courts have uniformly held that each separate transaction or occurrence that contravenes the order is a distinct violation subject to penalty. *United States* v. *American Greetings Corp.,* 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd,* 272 F.2d 945 (6th Cir. 1959) (each removal of competitors' greeting cards from mounts bearing competitors' trademarks and trade names held a violation of FTC Order); *United States* v. *Wilson Chemical Co.,* CCH 1962 Trade Cases. ¶ 70, 478 (W.D. Pa. 1962), *aff'd per curiam,* 319 F.2d 133 (3d Cir. 1963) ("each comic book [containing the prohibited false advertisement] published and mailed which reached the hands of a recipient is a violation of the order"); *United States* v. *Bostic,* 336 F. Supp. 1312 (D.S.C. 1971), *aff'd* 473 F.2d 1388 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973) (each prohibited "bait and switch" consumer transaction constitutes a violation); and *United States* v. *J. B. Williams, Inc.,* 498 F.2d 414, 435-436 (2d Cir. 1974) (each broadcast of a prohibited advertisement held a violation).

With respect to the imposition of civil penalties, the threshold issue can be framed in this fashion: On how many occasions on or after December 31, 1965 did the defendant receive, or induce and receive, or contract for the receipt of, payments from its newspaper suppliers for promotional or display programs? Since the complaint alleged the receipt of illegal payments only from the Times, the News and the Post, the Government will not discuss at this juncture other illegally induced payments, which

are relevant to the question of the *amount* of penalties imposed. The evidence adduced at trial showed that the defendant induced and received consideration from its newspaper suppliers on at least 122 * occasions, as the District Court found (1057a).

Turning first to payments received by the New York Times, Thomas P. McVeigh, Corporate Comptroller of the New York Times, testified that in 1969 he directed the compilation of a list of all bills rendered by the Union News Company to the New York Times for the rental of advertising space on Union News Company stands (Tr. 167-170; 309a-312a). An affidavit prepared by Mr. McVeigh in 1969, with exhibits consisting of Union News invoices, demonstrates that once each month for forty-two months, from January, 1966 through June, 1969, Union News rendered bills to the New York Times, in the amount of $2,587.20 and that the Times made the requested payments to Union News (GX 33; 671a). There were therefore forty-two violations of the FTC Order with respect to the Times within the period covered by the complaint. Ancorp does not dispute that these transactions occurred; rather, the burden of its argument has been that the invoices rendered by and the payments made to the Union News have been misconstrued by all the newspapers involved and the District Court as well.

The proof at trial of the defendant's promotional display agreements with the Daily News was also uncontradicted. William Carey, circulation manager of the Daily News testified that the Daily News received invoices in the amount of $500.00 for advertising services from the Union News Company on a weekly basis from June 1, 1964 through March 2, 1969, except for periods (prior to 1966) when the Daily News was not published as a result of strikes (Tr. 200, 342a). Mr. Carey's recollections are borne out

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* Judge Bonsal took issue with the Government's computation of the number of violations, 367 F. Supp. at 1224 n. 5 [footnote page of District Court opinion omitted from appellant's appendix]. The Government confesses error on this point.

by the bills actually sent by Union News to the Daily News, (GX 50, 806a) and the letter from J. J. Lynch of the Daily News to William McCollough of Union News, dated August 4, 1969, terminating the advertising services agreement retroactively to March 3, 1969 (GX 52, 808a). While the Government could have claimed that Union News' exaction of weekly payments from the Daily News exposed the defendant to penalties for 169 violations of the FTC Order, ¶ 2 of the prayer for relief in the complaint (11a) speaks only of monthly violations for all three New York City newspapers. Since there was a period of thirty-eight months within the ambit of the statute of limitations during which Union News billed the Daily News in contravention of the FTC Order, the complaint alleged and the Government's proof at trial showed, at the very least, thirty-eight violations of the Order with respect to the Daily News.

The evidence of the defendant's illegal inducements of payments from the New York Post is equally unequivocal. Byron Greenberg, circulation director of the New York Post, testified that the Union News Company rendered bills to the Post on a monthly basis, in the amount of $50.09, for advertising services, from July of 1964 through June of 1969 (Tr. 283-287, 425a-429a). The invoices in evidence support Mr. Greenberg's testimony on this point (GX 10, 624a) and his letter to William A. McCollough of Union News, dated July 22, 1969 (GX 2, 618a) confirms the date given for the termination of the agreement. It is clear that during the period covered by the complaint Ancorp was guilty of forty-two violations of the FTC Order in its contractual dealings with the New York Post.

In sum, the Government proved at trial the 122 violations of the FTC Order found by Judge Bonsal. Conceding the existence of the agreements with its newspaper suppliers, Ancorp nonetheless contends on appeal that it was innocent of the charges levelled by the Government. Its arguments—extensions at best of its affirmative defenses—will be examined seriatim.

A. The Government Complied with the Certification Procedure

In its motion to dismiss the complaint, Ancorp argued, *inter alia*, that it should have been granted an evidentiary hearing before the Federal Trade Commission prior to the filing of a complaint for civil penalties (18a-37a). Judge Tyler rejected this argument (72a-74a), and it has not since been successfully made elsewhere. *United States* v. *Swingline, Inc.*, 371 F. Supp. 37, 46 (E.D.N.Y. 1974); *cf., United States* v. *Beatrice Foods Co.*, 493 F.2d 1259, 1269 n. 11 (8th Cir. 1974). Ancorp does not press this "due process" argument on appeal; and in light of this Court's recent discussion of the question of adequate notice to persons subject to FTC Orders, *United States* v. *J. B. Williams Company, Inc.*, 498 F.2d at 434-435, the argument would in any event fail.

Ancorp does, however, make a related procedural argument even less well founded than its "due process" point. In the course of opposing the motion to dismiss, the Government submitted an affidavit which averred that, in accordance with 15 U.S.C. § 56, the Federal Trade Commission had certified the facts of Ancorp's violations of its Order to the Attorney General prior to the institution of suit (Aff. ¶ 14, 39a). This assertion was never denied by Ancorp in the District Court. Indeed, Judge Bonsal took express notice of the absence of dispute concerning compliance with the certification procedure. 367 F. Supp. at 1223 n. 1.* Certification by the Federal Trade Commission is a jurisdictional prerequisite to suit. *United States* v. *St. Regis Paper Co.*, 355 F.2d 688, 699 (2d Cir. 1966) and *United States* v. *J. B. Williams Company, Inc.*,

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* No appendix reference is given for this citation because of the failure of the appellant to include the footnote page of the District Court's opinion in the Appellant's Appendix, an omission the Government did not discover until after the preparation of the Appellee's Appendix.

supra, at 437. On appeal, Ancorp urges for the first time that "[i]n light of the Government's failure to come forth with proof of the appropriate certification, this action was clearly untimely and procedurally defective" (App. Br. at 9). It would be a sufficient response to this argument to state that (1) Ancorp's failure to controvert the Government's assertion of compliance with 15 U.S.C. § 56 constituted an admission, and (2) Ancorp is estopped from denying the certification's existence on appeal. But because of the importance this Court has recently attached to the certification by the FTC, *United States* v. *J. B. Williams Company, Inc., id.,* the Government will not simply rest on rules governing the shifting of burdens of proof. To put the matter wholly at rest, the Government has included the certification in its appendix (1085a-1087a), in accordance with the Order of this Court dated September 25, 1974. Ancorp's claim of Governmental non-compliance with 15 U.S.C. § 56 is thus completely spurious.

B. The FTC Order Applies to Newspapers

Ancorp's second contention is that inasmuch as the original proceeding before the FTC related only to magazines and cigars, the order does not apply to newspapers. A reading of the order, however, refutes that contention since it applies without limitation to "products for resale on [defendant's] newsstands" and relates to payments received from "any of [defendant's] suppliers" (71a). Since newspapers are products which are sold on defendant's newsstands, and since the payments in question came from suppliers of those newspapers, there seems little doubt that the order applies to this case.

There can be no doubt that the FTC is empowered to frame broadly prophylactic decrees. Concerning the reach of Federal Trade Commission cease and desist orders, the United States Supreme Court has held:

> "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact

> compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity" (Footnote omitted).

Federal Trade Commission v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Moreover, should there be any doubt about the inclusion of newspapers within the FTC Order in this case, an examination of its history shows that Ancorp was fully and fairly apprised that the order applies to newspapers as well as magazines. The Orginal Decision of the hearing examiner contained an initial order with the examiner's findings and conclusions. The order covered products for resale on defendant's newsstands and had a specific phrase including newspapers as well as other enumerated products (52a). Thus, as the FTC does in many cases, the remedial order was broadened beyond those products on which evidence was introduced, to comprehend the entire product line at defendant's newsstands.

On review by the Commission, the hearing examiner's findings as to violations involving the sale of cigars were reversed on the grounds that a request for a promotional allowance was not shown to have been an inducement in violation of law. However, in spite of the specific contrary holding with respect to sales by cigar manufacturers, the Commission included in its Opinion a requirement that the order prohibit the defendant from "actually receiving discriminatory allowances from their suppliers, including

cigar manufacturers" (67a). The Final Order of the Commission was, in all respects, consistent with this portion of the Opinion but modified the order of the hearing examiner by eliminating the specific references to individual products. It did, however, include a prohibition against illegal conduct relating to "any of their suppliers". The Order of the Court of Appeals (68a) and the Modified Order of the Commission after the decision of the Court of Appeals (70a) both continue the same prohibitory language. Thus, it seems clear beyond a doubt that the order now in effect was intended to cover all products, including newspapers, which were sold on defendant's newsstands.

Ancorp's contention that the FTC Order had no application to newspapers was rejected by Judge Tyler at the close of oral argument on the motion to dismiss (74a) and similarly rejected by Judge Bonsal, 367 F. Supp. at 1225, n. 6. It deserves similarly short shrift by this Court.

To the extent that Ancorp claims that it misconceived the scope of the FTC Order (see App. Br. at 17), that argument is badly undercut by its inconsistent contention that it attempted to notify its newspaper suppliers of the fact that it was subject to the FTC Order (App. Br. at 30).

However, even if Ancorp could have asserted with absolute sincerity that it misunderstood its obligations under the FTC Order, such a misunderstanding would be insufficient as a matter of law to defeat a suit for civil penalties under 15 U.S.C. § 45(1). As the Court of Appeals for the Eighth Circuit has recently had occasion to observe:

> "Litigation continually arises as the meaning and breadth to be given consent decrees in antitrust cases. [Citations omitted.] Simply because a party misconstrues its lawful obligations under such de-

> crees, it is not afforded a legal defense if in law that interpretation turns out to be erroneous. Misunderstanding of the law is no more an excuse under the Clayton Act than anywhere else."

United States v. *Beatrice Foods Co., supra,* 493 F.2d at 1269.

C. Ancorp induced payments for promotional and display services from its newspaper suppliers

Ancorp's third contention is that its inducement and receipt of substantial payments from its newspaper suppliers was not in violation of the FTC Order since that Order merely proscribed the receipt of money for "display or promotional services or facilities", whereas Ancorp received "continuations of historic discounts." This argument was succinctly summarized and answered by the District Court (1053a, 367 F. Supp. at 1224):

> "Defendant contends on the basis of the testimony of Mr. William McCollough (President of Ancorp) that the payments received were not true advertising allowances, but rather price allowances, and that they were made as part of an effort to increase Ancorp's profits on the sale of newspapers. However, the invoices sent out to the three newspapers by Union News, which were received in evidence, themselves indicated that they were for advertising services. Moreover, Mr. McCollough acknowledged that the Union News Company received posters from the three newspapers to be displayed on its newsstands.[3]"

"[3] [Court's footnote] This issue was presented to the Court of Appeals, which said: "[E]ven if these payments were all no more than disguised price adjustments, as petitioners contend, they would nevertheless violate § 2(d) [of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(d), which] was aimed explicitly at promotional allowances which have the effect of price adjustments." 300 F.2d at 109."

There are only a few points that should be added to Judge Bonsal's telling statement. First, it was Henry Garfinkle, President of the defendant corporation, who first proposed that newspaper publishers should pay Union News for the privilege of placing advertising material at the newsstands (See, e.g., GX 12, 625a). Second, in the cases of the Times, the News, the Wall Street Journal and the Herald Tribune, the initiative for a poster plan was unequivocally provided by Union News executives; in the case of the Post, the pressure provided by the withholding of $44,000 in accounts receivable may have induced its business manager to suggest a promotion plan to which he knew the Post would acquiesce in due course. Knowing that the financially sounder newspapers, the Times and the News, had capitulated to Union News (Tr. 272, 414a) the Post business manager simply accelerated the day of reckoning. Third, the uncontradicted testimony of all newspaper witnesses was that they were paying Union News for promotional or display services, however grudging the payments may have been. Finally, the argument that the true consideration for the payments by the newspapers was Union News' agreement to maintain the suggested retail cover price at all its stands is vitiated both by the witness Mineo's admission that Union News had no means of ascertaining whether the cover price was so maintained (Tr. 462, 605a) and also by the inconclusiveness of the testimony of newspaper executives concerning whether their papers were actually sold at cover price at Union News stands.

D. Ancorp Neither Notified its Newspaper Suppliers of the FTC Order nor Inquired about their Promotional Agreements with other Newsstand Outlets

Ancorp's fourth argument is a curious amalgam: it asserts that it had no competitors and was therefore free to enter into any kind of promotional agreement it chose

with its newspaper suppliers; alternatively, it urges that it fully notified its newspaper suppliers of the existence of the FTC Order and dutifully inquired about the proportionality of the newspapers' promotional agreements with other newsstand outlets.

The Government cannot improve upon Judge Bonsal's formulation of the "no competitors" argument (367 F. Supp. at 1224, n.2):

> "Defendant contends that since its stands were better lit, more fully stocked, open for longer hours, staffed by unionized sales employees, occupied more desirable locations and were subject to more stringent regulations by its landlords (railroads, airports, and bus terminals), it had no competitors to whom proportionally equal terms could have been offered."

We also adopt his response to that contention (*id*):

> "The evidence, however, established that defendant's stands competed with other retail newspaper dealers in that they purchased the same products from the same suppliers and resold these products unaltered in the same market."

"The District Court's formulation of the test is fully in accord with Chief Judge Knox's classic definition of competition in *United States* v. *Aluminum Company of America*, 91 F. Supp. 333, 355 (S.D.N.Y. 1950):

> "Commercial competition, theoretically, is the independent endeavor of two or more persons or organizations within the realm of a chosen market place, to obtain the business patronage of others by means of various appeals, including the offer of more attractive terms or superior merchandise."

This definition has been adopted in Robinson-Patman Act cases, as well as in Sherman Act cases in which the ques-

tion more frequently arises. See *Baum* v. *Investors Diversified Services, Inc.*, 286 F. Supp. 914, 920 (N.D. Ill. 1968), *aff'd*, 409 F.2d 872 (7th Cir. 1969); *Ingram* v. *Phillips Petroleum Company*, 259 F. Supp. 176, 182 (D. N. Mex. 1966); and Rowe, *Price Discrimination Under the Robinson-Patman Act*, § 13.11 (1962). Since the F.T.C. Order tracks the language of 15 U.S.C. § 13(d), Section 2(d) of the Robinson-Patman Act, the foregoing legal test of competition was correctly followed below.

One ironic element of the "no competitors" argument is the statement by Ancorp that "[t]he only evidence offered by the Government of a supposed competitor is that of Mr. Green of the Eastern Newsstand Corporation * * *." (App. Brief at 33). Bernard Green was, of course, called by Ancorp at trial, and his Eastern News Company epitomizes the competition that exists between Union News and other companies with stands in proximate locations (Tr. 350, 492a). Moreover, each of the newspaper witnesses indicated that their newspapers were sold on a retail basis at thousands of stands, some of which were owned by Union News, the majority by many other less economically powerful companies. Competition between retail vendors of newspapers during the relevant period virtually conformed to the textbook model. No claim by Union News of the qualitative superiority of its stands will defeat this economic fact of life.

Turning to the alternative branch of the argument, Ancorp can point to only two acts it took after the effective date of the FTC Order to comply with its terms. First, it refers at several junctures to the letter written by Herbert Frilen, Executive Vice President of The American News Company, dated October 24, 1962, and addressed to "Gentlemen" (GX 61-3, 87a, 829a). Ancorp's reliance upon this letter is wholly misplaced. Mr. Frilen testified that he was solely concerned with magazines, and that the letter

was not sent to the defendant's newspaper suppliers (Frilen Deposition Tr. 25-28, 1200a-1203a). Second, Ancorp points to the Garfinkle Memorandum of March 8, 1963 addressed to all the officers and directors of American News and Union News (GX 61-3a, 88a). While this memorandum may have alerted the companies' executives to their stringent obligations under the FTC Order, it did not by itself place any supplier on notice. The sole testimony introduced regarding the effect of the Garfinkle memorandum was given by President McCollough, who frankly admitted that he did absolutely nothing after receiving it, assuming he read it all (Tr. 412, 554a).

The question of what Ancorp was required to do under the FTC Order was clearly answered by this Court twelve years ago on review of that very order. In *American News Company* v. *Federal Trade Commission, supra,* 300 F.2d at 111, this Court said:

> "Petitioners contend that the order places undue burdens on them by forbidding inducement and receipt of payments when they know, or should know, that proportional payments are not 'affirmatively offered or otherwise made available' to their competitors. They attack specifically the provisions we have italicized. There is nothing in the Supreme Court's opinion in Automatic Canteen . . . which precludes the imposition of a duty of reasonable inquiry upon a buyer . . . If he is apprised of sufficient information about payments which he *induces and receives* to create a duty of further inquiry, the buyer, under this order, must see first if the payments are affirmatively offered to his competitors on a proportionally equal basis; if not, the order indicates he may have a further duty to see whether they are 'otherwise made available.'" (Emphasis supplied.)

In a later case, *Giant Food, Inc.* v. *Federal Trade Commission,* 307 F.2d 184 (D.C. Cir. 1962); *cert. denied,* 372 U.S. 910 (1963), the Court of Appeals for the District of Columbia stated:

> "... Automatic Canteen* certainly cannot be read to mean that a buyer can plead want of knowledge as a successful defense to charges in a complaint ... in circumstances where it appears that such want of knowledge on the buyer's part was culpable. This being so, the question becomes whether ... Giant, at the time it *induced and received* the payments from its suppliers, possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to Giant's competitors." 307 F.2d at pp. 186-187; emphasis supplied.

Accord, Fred Meyer, Inc. v. *F.T.C.,* 359 F.2d 351, 366, (9th Cir. 1966), *rev'd in part and remanded on other grounds,* 390 U.S. 341 (1968), and *Colonial Stores, Inc.* v. *F.T.C.,* 450 F.2d 733, 746 (5th Cir. 1971).

Consequently, Ancorp failed to satisfy its duty of inquiry under the F.T.C. Order when it induced and contracted for the forbidden promotional service payments from its newspapers suppliers.

In sum, none of the denials, justifications or other affirmative defenses offered by Ancorp should exonerate it from the District Court's finding of manifold violations of the F.T.C. Order.

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* *Automatic Canteen Company of America* v. *F.T.C.,* 346 U.S. 61 (1953).

POINT II

The District Court did not abuse its discretion in imposing penalties of $204,200 and permanently enjoining Ancorp from further violations of the FTC order.

A. The Size of the Penalties

This Court has recently had occasion to review the imposition of civil penalties pursuant to 15 U.S.C. § 45(1). In *United States* v. *J.B. Williams Company, Inc., supra* at 438, the Court stated:

> "As the Court below recognized, the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay. [Citations omitted.]"

Significantly, while this Court reversed the District Court's entry of summary judgment in favor of the Government and remanded for a jury trial of the issues concerning the Geritol advertisements, with respect to the counts dealing with the FemIron advertisements, on which this Court affirmed the granting of summary judgment, it let stand the $155,000 in penalties imposed on the defendant J.B. Williams. It would seem, therefore, that once the District Court's finding of violations of an F.T.C. Order has been affirmed, its determinations of appropriate penalties will not be lightly disturbed.

In determining whether Judge Bonsal abused his discretion in penalizing Ancorp, this Court should first consider the standard adopted by the District Court (1054a, 367 F. Supp. at 1224):

> "In assessing the amount of penalties to be imposed for each violation, the relevant factors are: the will-

fulness of the violations, the total amounts of the payments received by the defendant in violation of the FTC Order, the harm to the public from the violations, and the financial capacity of the defendant to pay whatever penalties are imposed. [Citations omitted.]"

The District Court carefully weighed each of the factors before imposing the following penalties (1057a, 367 F. Supp. at 1225):

On Count 1: $2,500 for each of 42 violations [the Times]	$105,000
On Count 2: $2,500 for each of 38 violations [the Daily News]	95,000
On Count 3: $100 for each of 42 violations [the Post]	4,200
Total Penalties	$204,200

(i) Willfulness of the Defendant's Violations

On February 5, 1959, the Federal Trade Commission filed an administrative complaint, charging respondents American News Company (now "Ancorp National Services, Inc."), and Union News Company (now a subdivision of Ancorp) with unfair competitive practices. After the full gamut of administrative hearings and appeals were run, the FTC issued a final cease and desist order on January 10, 1961. Undaunted, the respondents challenged the order in the courts, where the FTC Order was, with slight modification, affirmed. *American News Company* v. *Federal Trade Commission*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962). Against this background of three years of litigation, it can hardly be argued that Ancorp was unaware of the existence or nature of the FTC Order.

Notwithstanding this history and the unambiguous instructions given by President Garfinkle to the corporate executives concerning promotional and display arrange-

ments with suppliers (GX 61-3a, 88a), it is clear that Ancorp continued to conduct its business affairs with utter disregard for the FTC Order. The evidence at trial disclosed that neither Mr. Garfinkle, Mr. McCollough nor any other responsible officer of the defendant company paid the slightest heed to an Order which the company had spent three years before the FTC and the courts trying to upset.

The significant facts to note in each of Ancorp's promotional service agreements are that it was always * an agent of the defendant corporation that initiated negotiation for the proscribed agreements; that not once did Union News ever apprise any of its suppliers of the pendency of the FTC Order; that it never inquired into the question of whether its newspaper suppliers had proportionally equal arrangements with other newsstand outlets; and that—in fact—those newspapers had virtually no such comparable agreements with any of defendant's competitors. Defendant's wanton disregard for the FTC Order was reflected in the candid admissions of William A. McCollough at trial (Tr. 412, 554a).

> "Q. Did you do anything to familiarize yourself with any programs, plans or agreements that the American News Company or the Union News Company had with any of its suppliers? A. No.
>
> Q. Did you make any inquiries to find out whether the Union News Company or the American News Company had any such agreements? A. Agreements in what respect, sir?
>
> Q. Agreements with its suppliers? A. No, I did not."

The record is clear that in the period immediately after the entry of the FTC Order, the defendant sought to exact from its newspaper suppliers precisely the kind of promotion and display agreements that the Robinson-

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* In the case of the Post, Ancorp provided the impetus for discussions of a promotional agreement by withholding from the Post substantial accounts receivable.

Patman Act and the Federal Trade Commission's cease and desist order were designed to bar.

(ii) The Defendant's Unjust Enrichment

The problem confronting the District Court in fashioning a remedy appropriate to the wrongs committed here is analagous to that presented in *S.E.C.* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y. 1970), where the Court was also presented with a statutory provision (Section 10(b) of the Securities and Exchange Commission Act of 1934) which did not seem precisely tailored to the proven wrongdoing. There, the District Court concluded that, in addition to granting the injunction sought by the SEC, it would order the defendant corporate officials to relinquish such profits as they had realized by illegally taking advantage of insider's information. 312 F. Supp. at 92. This aspect of the judgment was upheld by this Court in *S.E.C.* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971), which reversed the District Court on other grounds. The Court of Appeals stated, 446 F.2d at 1308:

> "Restitution of the profits on these transactions merely deprives the appellants of the gains of their wrongful conduct."

The Government submits that in the instant case the penalty properly bore a relationship to Ancorp's unjust enrichment. A much smaller penalty would not only fail to deter future violations by this defendant and other respondents subject to FTC Orders, but could be construed as no more than a license fee for the privilege of flouting the law.

The record shows that Ancorp profited by discriminatory price allowances and promotional agreements—at the expense of the newspaper and fair competition—in the amounts indicated by the table * below:

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* The derivation of the figures for the newspapers other than the Times, the News and the Post is as follows: For the Herald

[Footnote continued on following page]

Newspaper	1964	1965	1966	1967	1968	1969
New York Times	$31,046	$31,046	$31,046	$31,046	$31,046	$13,816
New York Daily News	26,000	26,000	26,000	26,000	26,000	5,000
New York Post	600	600	600	600	600	350
New York Herald Tribune	12,000	12,000	3,000			
Wall Street Journal		3,000	6,000	6,000		
El Tiempo	131	189	946	1,130	1,388	2,882
Newark Star Ledger	654	500	494	494	7,064	7,487
New York Amsterdam News		176	162	478	746	766
New York Column					852	521
Harrisburg Patriot	415	412	415	406	407	407
Total	$70,846	$73,923	$68,613	$66,149	$68,103	$34,179

Tribune, the Government assumes that the lower of the two figures given by the deponent, Roy Newborn, is accurate, and has extrapolated that rate of payment for the period of the newspaper's life. The payments listed for the Wall Street Journal are reflected in the testimony of the witness, John Potulney, as clarified in the letter to the Court, dated July 17, 1973, from Robert S. Potter, Esq., counsel to Dow Jones & Company, Inc. (publisher of the Journal). The figures representing the payments for the last five newspapers listed in the table are taken directly from the Defendant's Amended Answers to Interrogatories, verified by Vincent Mineo on April 13, 1972. These answers are binding upon the party-defendant. *Alamo Theatre Co.* v. *Loew's Inc.*, 22 F.R.D. 42, 45 (N.D. Ill. 1958), *Brayton* v. *Crowell-Collier Pub. Co.*, 205 F.2d 644 (2d Cir. 1953).

Where, as here, the defendant received approximately $380,000 from its suppliers pursuant to agreements explicitly prohibited under the FTC Order and had concededly received untold thousands of dollars prior to the effective date of the Order (but in violation of the Robinson-Patman Act), the District Court's assessment of penalties in the amount of $204,200 was not only warranted by statute but also appropriate under the circumstances.

(iii) Capacity of Defendant to Pay Substantial Judgment

Throughout the trial, the defendant reiterated the fact that it was involved in arrangement proceedings under Chapter XI of the Bankruptcy Act, and that this fact, standing alone, should "mitigate" the damages (Tr. 474, 1067a). There was, however, no proof offered regarding the profitability of the Union News Division, historically or during the present period of reorganization. The Government has already shown (*supra*, 9-10) that the sale of newspapers represented a substantial source of income for Ancorp, even without the illegal promotional payments. Judge Bonsal also expressed the concern that the penalty would not "come out of the pockets of the creditors and stockholders of Ancorp" (Tr. 479, 1072a).

The answer to these concerns is relatively simple. The Government believes that a judgment for penalties, such as one granted under 15 U.S.C. § 45(1), is not dischargeable in the pending arrangement proceeding, under the provisions of 11 U.S.C. §§ 35 and 771; *cf., Sherwood* v. *United States*, 228 F. Supp. 247 (E.D.N.Y. 1964), *Zwick* v. *Freeman*, 373 F.2d 110 (2d Cir.) *cert. denied*, 389 U.S. 835 (1967). The Government informed the District Court that it would not seek to collect its judgment, if it were successful in this action, prior to the confirmation of Ancorp's arrangement with its creditors in the Chapter XI proceeding in Bankruptcy Court. Bearing this factor in mind, the District Court did expressly consider Ancorp's financial condition in fashioning a judgment (1056a-1057a, 367 F. Supp. at 1225). Ancorp's uncertain future may well explain the

moderation of the District Court's penalty assessment, in light of the one-sidedness of the proof and the equities.

Finally, while comparisons among different actions brought under 15 U.S.C. § 45(1) are of limited value, it should be pointed out that the District Court's decision to impose $2,500 per violation in the case of the Times and the News and $100 per violation in the case of the Post was not unprecedented. In addition to the assessment of maximum penalties of $5,000 per broadcast of prohibited medicinal commercials, *United States* v. *J. B. Williams Company, Inc.*, 354 F. Supp. 521 (S.D.N.Y. 1973), *rev'd and remanded in part on different grounds*, 498 F.2d 414 (2d Cir. 1974), the following examples are also pertinent: *United States* v. *Bostic*, 336 F. Supp. 1312 (D.S.C. 1971), *aff'd*, 473 F.2d 1388 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) ($4,000 assessed for each of twenty retail sales of swimming pools through use of prohibited "bait and switch" advertising); *United States* v. *Vitasafe Corp.*, 234 F. Supp. 710 (S.D.N.Y. 1964), *aff'd*, 352 F.2d 62 (2d Cir. 1965) (where Judge Weinfield imposed penalties of $2,000 for each of nine violations of an order barring a vitamin distributor from shipping additional merchandise and billing therefor after the receipt of cancellation notices from customers); *United States* v. *Wilson Chemical Co.*, CCH 1962 Trade Cases ¶ 70,478 (W.D. Pa. 1962), *aff'd per curiam*, 319 F.2d 133 (3d Cir. 1963) (imposing $5,000 for each of nine publications, in comic book issues, of a prohibited advertisement); and *United States* v. *American Greetings Corp.*, 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd* 272 F.2d 945 (6th Cir. 1959) (imposing nominal penalties of $100 per violation in instances where the Government apparently acquiesced in proscribed conduct,* but imposing

* There is no support in the record for Ancorp's gratuitous suggestion that the Government knew of and disregarded the payments for many years (App. Br. at 39). Indeed, the FTC did not conduct its investigational hearings until September of 1969, *after* the Wall Street Journal courageously broke the story of Union News' control of the retail sales of newspapers in the

[Footnote continued on following page]

penalties of $2,500 and $5,000 per violation for intentional violation of order prohibiting, in essence, the disregard of competitors' tradenames and trademarks).

Under the circumstances here, the District Court acted well within its discretion in imposing penalties of $204,200.

B. The Injunction

As a prophylactic measure, the District Court also permanently enjoined Ancorp from further violations of the FTC Order (1057a, 367 F. Supp at 1225).

In *United States* v. *Vitasafe Corp., supra,* 234 F. Supp. at 716-717, Judge Weinfeld concluded that:

> "In totality, there were such widespread violations of the terms of the Commission's order and a lack of purpose to prevent them as to warrant an injunction against future violations." (Footnote omitted.)

Following Judge Weinfeld's lead, the District Court in *United States* v. *Bostic, supra,* 336 F. Supp. at 1321 ruled that:

> "The course of action pursued by the defendant in intentionally violating the provisions of the Commission's Order, and his evident purpose to engage in the same 'bait and switch' sales method, had convinced this Court that future violations of the Order can be prevented only by issuance of an injunction under the equitable powers vested in United States Courts."

In view of Ancorp's stanch insistence even on appeal that the contracts it induced from the newspapers for promotion and display were lawful under the terms of the Order, there is the risk that it will enter into comparable contracts from newspaper suppliers in the future. The District Court had ample authority to enjoin Ancorp from taking

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metropolitan New York City area (Tr. 440, 583a). Application of the doctrine of estoppel would be wholly inappropriate here.

such action again in the future. 15 U.S.C. § 49 provides in part that:

> "Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of Sections 31 to 36 and 47 to 48 of this title or any order of the Commission made in pursuance thereof."

Where, as here, the original FTC Order was to prevent Ancorp from engaging in unfair competitive acts, 15 U.S.C. § 45, and where the Chairman of the F.T.C., in his certification letter (1087a) requested equitable relief, the District Court quite properly entered a permanent injunction. In addition, under the 1973 amendment to 15 U.S.C. § 45(1), Pub. L. 93-153 Title IV, § 408(c), (d) the District Court was given power expressly to grant mandatory injunctions.

If this Court were to vacate the injunction and if Ancorp were to induce discriminatory promotional and display service contracts from any of its suppliers in the future, the Government could bring further penalty proceedings under 15 U.S.C. § 45(1), a demonstrably cumbersome procedure. Alternatively, and preferably, it could initiate original contempt proceedings before the Court of Appeals for the Second Circuit, inasmuch as this is the court that affirmed, as modified, the F.T.C. Order. *American News Company* v. *F.T.C.*, *supra*. Surely, in the interests of judicial economy, it is more sensible to permit contempt proceedings to be brought before one district judge instead of three circuit judges. (***But see, United States*** v. *J. B. Williams Company, Inc.*, *supra*, at 424 n. 14). The Government does not anticipate having to use the contempt sanction; but in a case such as this where the defendant continues to argue in 1974 that it should be permitted to enter into contracts that the F.T.C. has been attempting to bar since 1959, the permanent injunction should be allowed to stand.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for Plaintiff-Appellee.

GERALD A. ROSENBERG,
NAOMI REICE BUCHWALD,
Assistant United States Attorneys, of Counsel.

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 25th day of October 1974 s he served 2 copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Saxe, Bacon, Bolan & Manley, Esqs., 39 East 68th St. NY NY 10021

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sworn to before me this

25th day of October 19 74

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975